Supreme Court, U.S.
FILED

No. 94167 6 APR 13 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

STATE OF NORTH CAROLINA,
Petitioner,

v.

ALAN HOWARD PENDLETON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

MICHAEL F. EASLEY
Attorney General

Valérie B. Spalding
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone 919-733-3109
Attorney for Petitioner

QUESTION PRESENTED

MAY A PRIVATE RELIGIOUSLY AFFILIATED UNIVERSITY BE STRIPPED OF ITS POLICE PROTECTION--STATUTORILY OFFERED AS A NEUTRAL BENEFIT TO ALL--BY NECESSARILY RIGID ADHERENCE TO AN HISTORICALLY AND LOGICALLY INAPPOSITE TEST?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AMENDMENT AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD ISSUE 7

I. The supreme court's *Pendleton* decision epitomizes the difficulties inherent in applying the *Lemon* test. 7

II. The supreme court's *Pendleton* opinion aptly justifies the criticisms levelled at the *Lemon* test. 12

CONCLUSION 16

APPENDIX A1-A44

TABLE OF AUTHORITIES

CASES

Aguilar v. Felton, 473 U.S. 402 (1985) 14

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) 13

Board of Educ. of Kiryas Joel v. Grumet, ___ U.S. ___,114 S. Ct. 2481 (1994) 12, 15

Bowen v. Kendrick, 487 U.S. 589 (1988) 12, 14

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 11, 15

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 14

Edwards v. Aguillard, 482 U.S. 578 (1987) 14

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) 14

Hunt v. McNair, 413 U.S. 734 (1973) 10

Lamb's Chapel v. Center Moriches, ___ U.S. ___, 113 S. Ct. 2141 (1993) 8, 13, 16

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 6, 9, 10

Larson v. Valente, 456 U.S. 228 (1982) 13

Lee v. Weisman, 505 U.S. ___,
112 S. Ct. 2649 13

Lemon v. Kurtzman, 403 U.S.
602 (1971) 6-9, 12-16

*Roemer v. Maryland Public
Works Bd.*, 426 U.S. 736 (1976) 11, 15

*Rosenberger v. Rector & Visitors
of University of Va.*, 18 F.3d 269
(4th Cir. 1994), cert. granted, ___
U.S. ___, 115 S. Ct. 417 (1994) 17

State v. Pendleton, 112 N.C. App. 171,
435 S.E.2d 100 (1993) 6

State v. Pendleton, ___ N.C.
___, 451 S.E.2d 274 (1994) 2, 6-12, 16

Tilton v. Richardson, 403 U.S.
672 (1971) 10, 11

Wallace v. Jaffree, 472 U.S. 38 (1985) 14

Walz v. Tax Comm'n, 397 U.S.
664 (1970) 15

*Zobrest v. Catalina Foothills
School Dist.*, 509 U.S. __,
113 S. Ct. 2462 (1993) 13

STATUTES

28 U.S.C. § 1257(3) 2

N.C. Gen. Stat. § 74A (1989) 3, 4, 6, 7, 8

N.C. Gen. Stat. § 74A-1 (1989) 2, 3

N.C. Gen. Stat. § 74E (1992) 8

N.C. Gen. Stat. § 74E-2 (1992) 4

CONSTITUTIONS

U.S. Const. Amend. I 3

N.C. Const. Art. I, Sec. 13 & 19 5

MISCELLANEOUS

N.C.R. App. P. 32(b) 2

Rule 10.1(b) and (c) of the Rules
of the Supreme Court of the United States 2

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

STATE OF NORTH CAROLINA,
Petitioner,

v.

ALAN HOWARD PENDLETON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and Valérie B. Spalding, Assistant Attorney General, respectfully prays that a writ of certiorari issue to review the judgment of the North Carolina Supreme Court, entered on December 30, 1994,

which reversed a decision of the North Carolina Court of Appeals which had in turn reversed an order of a superior court. The supreme court majority reinstated the superior court's decision that N.C. Gen. Stat. § 74A-1 to 74A-6 (1989) ("Company Police") was unconstitutional as applied to the particular private university in this case.[1]

OPINION BELOW

This petition seeks review of the published decision by the North Carolina Supreme Court, which is reported at *State v. Pendleton*, ___ N.C. ___, 451 S.E.2d 274 (1994), and which is reproduced in the Appendix at A1-A29.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on December 30, 1994.[2] The jurisdiction of this Court to review the North Carolina Supreme Court's decision is invoked pursuant to 28 U.S.C. § 1257(3) and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

---

[1] The parties to this proceeding are the Petitioner, the State of North Carolina (hereinafter referred to as "the State"), and Respondent Alan Howard Pendleton (hereinafter referred to as "Pendleton").

[2] The opinion of the North Carolina Supreme Court was filed on December 30, 1994. The actual judgment, however, was entered in the docket by the clerk twenty (20) days after the date of filing of the opinion. N.C.R. App. P. 32(b).

CONSTITUTIONAL AMENDMENT AND STATUTORY PROVISIONS

U.S. Const. Amend. I: Congress shall make no law respecting an establishment of religion . . . .

N.C. Gen. Stat. § 74A (1989) ("Company Police") (repealed by Session Laws 1991 (Regular Session, 1992), c. 1043, § 8 (effective July 25, 1992)) provides in immediately pertinent part:

> Any educational institution . . . whether State or private, . . . may apply to the Attorney General to commission such persons as the institution . . . may designate to act as policemen for it. The Attorney General upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company or corporation from any civil liability for the acts of such policemen, in exercising or attempting to exercise the powers conferred by this Chapter.

N.C. Gen. Stat. § 74A-1 (1989). The complete statute is reproduced in the Appendix at A30-A34.

N.C. Gen. Stat. § 74E-2 (1992) ("Company Police Act") provides in immediately pertinent part:

> A public or private educational institution or hospital, a State institution, or a corporation engaged in providing on-site police security personnel services for persons or property may apply to the Attorney General to be certified as a company police agency. A company police agency may apply to the Attorney General to commission an individual designated by the agency to act as a company police officer for the agency.

N.C. Gen. Stat. § 74E-2 (1992). The complete statute is reproduced in the Appendix at A35-A44.

STATEMENT OF THE CASE

On April 12, 1991, Pendleton, an undergraduate, was arrested for driving while impaired on the campus of Campbell University in Buies Creek, North Carolina. The arresting police officer was employed by the university's campus police force and commissioned pursuant to N.C. Gen. Stat. § 74A (1989). Pendleton was convicted in district court on June 26, 1991. He appealed to the superior court for a trial *de novo*.

On September 3, 1991, Pendleton filed a motion to dismiss the charge in superior court on the grounds that N.C. Gen. Stat. § 74A violated the First Amendment to the United

States Constitution and Article I, Sections 13 and 19 of the North Carolina Constitution. Pendleton alleged that the statute was unconstitutional because it permitted employees of a religious institution to be commissioned and to function as police officers, thereby authorizing a religious institution to exercise the State's police power.

At the hearing on Pendleton's motion, the arresting officer's testimony tended to show *inter alia* that Campbell University had eight full-time police officers, paid by the university and directly supervised by a captain who was also a cross-sworn county deputy sheriff [but paid by the university pursuant to contract] and who reported directly to the university's Dean of Student Life. The police station was on the university campus. The officers' responsibilities were to enforce the laws of North Carolina. The University's rules and regulations are set out in a student handbook but the officers did not enforce them: instead, they reported any violations to their supervisor. Violations were eventually reported to the Dean of Student Life. In answer to a hypothetical question, the officer testified that were there to be a party at which alcohol was being drunk (which is against university rules), the dorm personnel would take the names of those involved and report them to the Dean. An officer would enter only after being notified by the dorm personnel and would do no more than take the names of those involved and hold the alcohol prior to turning it over to the Dean.

After this testimony, Pendleton introduced extracts of the University Bulletin into evidence. The superior court

then took judicial notice that Campbell University is a private Baptist facility. On April 29, 1992, the superior court entered an order concluding that N.C. Gen. Stat. § 74A was unconstitutional because it created an excessive entanglement of state and church, constituted an impermissible delegation of authority to a religious institution and was an establishment of religion. The superior court allowed Pendleton's motion to dismiss.

The State appealed to the North Carolina Court of Appeals. On October 5, 1993, the court of appeals issued an opinion in which it applied this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and held that N.C. Gen. Stat. § 74A was constitutional both on its face and as applied to Pendleton. *State v. Pendleton*, 112 N.C. App. 171, 435 S.E.2d 100 (1993).

Pendleton appealed to the North Carolina Supreme Court. On 30 December 1994, also applying the *Lemon* test, and relying almost exclusively on this Court's decision in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), a bare majority of the supreme court issued an opinion reversing the court of appeals on the ground that Campbell University was a religious institution and that delegation of the State's police power to the university resulted in excessive entanglement under *Lemon*, thus violating the Establishment Clause under

Larkin. State v. Pendleton, ___ N.C. ___, ___, 451 S.E.2d 274, 281 (1994).[3]

REASONS WHY THE WRIT SHOULD ISSUE

THE NORTH CAROLINA SUPREME COURT'S DECISION TO STRIP A RELIGIOUSLY AFFILIATED PRIVATE UNIVERSITY OF ITS NON-TAXPAYER SUPPORTED POLICE PROTECTION DEMONSTRATES THAT THE *LEMON* TEST HAS BECOME UNWORKABLE AND UNFAIR.

I. The supreme court's *Pendleton* decision epitomizes the difficulties inherent in applying the *Lemon* test.

This case has caused trouble at all four levels of the North Carolina judicial system: district court, superior court, the court of appeals and the supreme court. Applying the

---

[3] The case was decided solely on federal constitutional grounds.

> [W]here a law has been applied in such a manner as to be a manifest violation of the federal constitution as interpreted by the Supreme Court of the United States, state constitutional review may be unnecessary and dilatory. Based on the particular evidence presented in this case, we conclude that, as applied, former Chapter 74A violated the First and Fourteenth Amendments to the Constitution of the United States. We base our decision in this case solely on federal constitutional grounds. We neither consider nor decide any state constitutional issues.

State v. Pendleton, ___ N.C. ___, ___, 451 S.E.2d 274, 277 (1994).

Lemon test, five judges have found N.C. Gen. Stat. § 74A to be unconstitutional as applied to Campbell University,[4] and seven have found it to be constitutional.[5] The final decision from the supreme court aptly demonstrates the difficulties that *Lemon* engenders.

In the supreme court, Pendleton conceded for the first time that N.C. Gen. Stat. § 74A was constitutional on its face. The supreme court therefore only considered the third prong of the *Lemon* test, that is, whether the delegation of the State's police power to Campbell University created or fostered an excessive government entanglement with religion. *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 278.[6] The majority noted that the entanglement prong has been much criticized, but concluded that pursuant to this Court's decision in *Lamb's Chapel v. Center Moriches*, ___ U.S. ___, 113 S. Ct. 2141 (1993), it was nevertheless still required to use *Lemon* as the "yardstick . . . for measuring the constitutionality of statutes under the Establishment Clause." *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 278.

Applying the *Lemon* yardstick, therefore, the court first determined that the police power is an important

---

[4] The superior court judge and four justices of the supreme court.

[5] The district court judge, three judges of the court of appeals and three justices of the supreme court.

[6] Although the supreme court majority attempted to restrict its decision to N.C. Gen. Stat. § 74A, the replacement statute, N.C. Gen. Stat. § 74E, is identical in all basic principles.

discretionary power. Nobody quarrels with this. But then, relying solely upon this Court's decision in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982),[7] the supreme court majority determined that Campbell University was a religious institution "within the meaning of that phrase as used . . . in *Larkin*." *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 280. To reach this determination, the court did no more than quote the University Bulletin's institutional rhetoric and its six plainly stated secular educational goals as had the superior court in reaching the same determination. *Id.* at ___, 451 S.E.2d at 279-80. This was, according to the court, "substantial evidence" that the university's secular purposes and religious mission were "'inextricably intertwined.'" *Id.* at ___, 451 S.E.2d at 281. In short, having decided to rely on *Larkin*, and interpreting this Court's holding therein as a blanket prohibition on the delegation of an important discretionary power to a religious institution, the majority in the supreme court forced Campbell University into the shape of a church, since *Larkin* would not else apply.[8]

The three-justice dissent pointed out that *Larkin* indeed did not apply for two reasons: first, this Court held in

---

[7] *Larkin* in turn relied heavily on *Lemon*. 459 U.S. at 123.

[8] To bolster its extraordinary decision, the supreme court repeatedly pointed out that the State had not excepted to the superior court's quotations from the University Bulletin. It would be a strange State's attorney indeed who objected to the truth.

Larkin that a delegation of state power to a church violates the Establishment Clause only when the church's exercise of that power fuses both religious and governmental functions; and second, both the institution and the delegated power here differ in nature from those in *Larkin*. *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 282.

The dissent then worked its way logically through the facts, pointing out that Campbell University is an institution of higher education, and that although it is affiliated with the North Carolina Baptist Convention, its Board of Trustees only governs university affairs and thus is distinct from the parish council (and churches) in *Larkin*. The dissent also relied on this Court's decisions in *Hunt v. McNair*, 413 U.S. 734 (1973), and *Tilton v. Richardson*, 403 U.S. 672 (1971), which both recognize that colleges and universities closely affiliated with, or even governed by a religious body are not necessarily pervasively sectarian. *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 282. Based thereon, the dissent concluded that "[t]hough closely affiliated with a religious denomination, Campbell does not subordinate secular education to religious doctrine; it functions neither as a church nor as a religious governing body." *Id.* at ___, 451 S.E.2d at 283. It is interesting that the majority completely ignored *Hunt*

and *Tilton*[9]; perhaps this was easier than attempting to distinguish them, since it cannot be done here.

The dissent also pointed out that in this case, unlike the situation in *Larkin*, there was neither an abdication of State power to a church nor a resultant fusion of governmental and religious functions. The Campbell University police officers were commissioned by the Attorney General of North Carolina under statutory authority. The university paid their salaries and remained civilly liable for their acts in the exercise of their authority under the statute. The officers had the same powers as do city and county police within the confines of property owned by the university, and, like all other law enforcement officers in North Carolina, were required to take both a statutory and constitutional oath pledging to exercise their duties within the limits of the federal and state constitutions and laws. *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 283-84. Finally, the dissent noted that Pendleton had failed to demonstrate that any of the Campbell police officers "proselytized students, visitors, or faculty or otherwise acted in a religious manner or for a

---

[9] The elements of the "profile" of a sectarian or substantially religious school are that (1) the school places religious restrictions on admission and faculty appointments, (2) that they enforce obedience to religious dogma, (3) that they require attendance at religious services and the study of particular religious doctrine, (4) that they are an 'integral part' of the religious mission of the sponsoring church, (5) that they have religious indoctrination as a 'substantial purpose', and (6) that they impose religious restrictions on how and what the faculty can teach. *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 752, n.18 (1976) (summarizing 'profile' as laid out by district court in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 767-68 (1973)).

religious purpose in their exercise of the powers delegated to them." *Id.* at ___, 451 S.E.2d at ___.[10] Again, it is interesting that the majority ignored the obvious.

Pendleton is a perfect example of the inherent difficulties in applying the *Lemon* test. Because of differing interpretations of *Lemon* and its inconsistent progeny in the state courts, a decent university in a rural county is now prevented from ensuring that properly trained law enforcement personnel are on campus and always readily available, not only to enforce state laws but also to provide adequate protection for its students.

II. The supreme court's *Pendleton* opinion aptly justifies the criticisms levelled at the *Lemon* test.

As noted above, the *Pendleton* majority acknowledged that the entanglement prong of the *Lemon* test has been much debated and criticized. *Pendleton*, ___ N.C. at ___, 451 S.E.2d at 277-78. But it is not just the entanglement prong that is suspect: it is the whole test.

Past and present members of this Court have consistently, albeit either individually and/or in dissent, suggested that *Lemon* should either be modified or repudiated altogether. *Board of Educ. of Kiryas Joel v. Grumet*, ___ U.S. ___,

---

[10] "It is not enough to show that the recipient of a challenged [power] is affiliated with a religious institution or that it is 'religiously inspired.'" *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988). Pendleton bore the burden of attempting to show that Campbell University is pervasively sectarian. *Id.*

114 S. Ct. 2481, 2498-500 (1994) (in *Lee v. Weisman*, 505 U.S. ___, 112 S. Ct. 2649 (1992), *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. ___, 113 S. Ct. 2462 (1993), and *Larson v. Valente*, 456 U.S. 228 (1982), Court's opinion not focussed on *Lemon* test; unitary test for broad set of cases sometimes does more harm than good) (O'Connor, J., concurring); *id.* at 2515 (problem with and allure of *Lemon* not that it is rigid, rather that in many applications it has been utterly meaningless) (Scalia, J., joined by Rehnquist, C.J., and Thomas J., dissenting); *Lamb's Chapel v. Center Moriches*, ___ U.S. ___, 113 S. Ct. 2141, 2149, (1993) (where unanimity that viewpoint-based discrimination contradicted Speech Clause, Court's citation of *Lemon* unsettling and unnecessary) (Kennedy, J., concurring in part and concurring in judgment); *id.* at 2149-250 (*Lemon* test akin to ghoul in late-night horror movie; Court's decision in *Lee v. Weisman*, 505 U.S. ___, 112 S. Ct. 2649, conspicuously avoided using *Lemon* test but declined invitation to repudiate it; no fewer than five of [then] currently sitting Justices in their own opinions have driven pencils through *Lemon* creature's heart) (Scalia, J., joined by Thomas J., concurring in judgment); *Lee v. Weisman*, 505 U.S. ___, 112 S. Ct. 2649, 2685 (*Lemon* test has received well-earned criticism from many members of Court) (Scalia, J., joined by Rehnquist, C.J., White and Thomas, JJ., dissenting); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 655-56 (1989) (persuasive criticism of *Lemon* has emerged; substantial revision of Establishment Clause doctrine may be in order) (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in judgment in part

and dissenting in part); *Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988) ('entanglement' prong of *Lemon* test much criticized over the years) (Rehnquist, C.J., joined by White, O'Connor, Scalia and Kennedy, J.J.); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 346 (1987) (another case illustrating difficulties inherent in Court's use of *Lemon* test) (O'Connor, J., concurring in judgment); *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (time to sacrifice 'flexibility' for 'clarity and predictability'; *Lemon*'s purpose test a good place to start) (Scalia, J., joined by Rehnquist, C.J., dissenting); *Grand Rapids School District v. Ball*, 473 U.S. 373, 400 (1985) (decision in *Lemon* not required by First Amendment and contrary to long-range interests of country) (White, J., dissenting); *id.* (*Lemon* 'entanglement' prong creates insoluble paradox in school aid cases) (Rehnquist, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 420 (1985) (decision in *Lemon* not required by First Amendment) (White, J., dissenting); *id.* (Court takes advantage of paradox it created with 'entanglement' prong) (Rehnquist, J., dissenting); *id.* at 421-22, 429-30 (questioning utility of 'entanglement' as separate Establishment Clause standard in most cases) (O'Connor, J., joined by Rehnquist, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Court's extended treatment of *Lemon* test suggests naive preoccupation with easy, bright-line approach to constitutional issues; *Lemon* not a rigid caliper) (Burger, C.J., dissenting); *id.* at 91 (Court should undertake to reassess cases dealing with Religion Clauses) (White, J., dissenting); *id.* at 109-10 ('entanglement' prong creates insoluble paradox; *Lemon* test has caused Court to fracture into unworkable

plurality opinions; school services cases show difficulty in making *Lemon* yield principled results) (Rehnquist, J., dissenting); *Roemer v. Maryland*, 426 U.S. 736, 767-69 (1976) (*Lemon* imposes unnecessary and superfluous tests for establishing when state's involvement with religion passes 'peril point') (White, J., joined by Rehnquist, J., dissenting); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 820 (1973) (*Lemon* not required by First Amendment; 'entanglement' prong did not surface until 1970 in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); remote relevance to other cases) (White, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

The state courts, of course, are bound by *Lemon* and must follow it and its progeny as best they can. *Kiryas Joel*, ___ U.S. ___, 114 S. Ct. 2481. But this Court is not so bound. By granting certiorari in this case, it could, at one stroke, finally abandon the *Lemon* test, replacing it with a standard more nearly in harmony with the basic principle of the First Amendment: there shall be no state religion forced upon the people of this country. This would, in turn, restore adequate police protection not only to Campbell University, but also to all the other private, religiously affiliated institu-

tions of higher learning in North Carolina[11] whose company police officers will be declared "unconstitutional" pursuant to *Pendleton* when they try to enforce state laws on campus.[12]

Justice Scalia has described the *Lemon* test as a ghoul from a late-night horror movie who continues to stalk this Court's Establishment Clause jurisprudence at will, frightening little children and attorneys. *Lamb's Chapel v. Center Moriches*, ___ U.S. at ___, 113 S. Ct. at 2149-250 (Scalia, J., dissenting). *Lemon* is now working its evil on North Carolina judges. This case offers the Court the necessary stake to drive through the *Lemon* creature's heart. *Id.*

CONCLUSION

For the foregoing reasons, the State respectfully requests that a writ of certiorari issue to review the decision of the North Carolina Supreme Court.

---

[11] Chowan College, Murfreesboro; Davidson College, Davidson; Duke University, Durham; Livingstone College, Salisbury; Mars Hill College, Mars Hill; Meredith College, Raleigh; Methodist College, Fayetteville; North Carolina Wesleyan College, Rocky Mount; Queens College, Charlotte; Saint Andrews Presbyterian College, Laurinburg; Saint Augustine's College, Raleigh; Shaw University, Raleigh; Wake Forest University, Winston-Salem.

[12] The North Carolina Supreme Court attempted to restrict its *Pendleton* decision to Campbell University alone, ___ N.C. at ___, 451 S.E.2d at 281, but it would be a brave district or superior court judge who ignored the decision.

In the alternative, the State respectfully requests that this case be held pending this Court's decision in *Rosenberger v. Rector & Visitors of University of Va.*, 18 F.3d 269 (4th Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 417 (1994), argued in the Court on March 1, 1995.

Respectfully submitted,

MICHAEL F. EASLEY
Attorney General

Valérie B. Spalding
Assistant Attorney General
N. C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: 919-733-3109

April 20, 1995.

APPENDIX

APPENDIX

TABLE OF CONTENTS

North Carolina Supreme Court Opinion
Filed December 30, 1994, *State v. Pendleton*,
___ N.C. ___, 451 S.E.2d 274 (1994) A1

N.C. Gen. Stat. § 74A (1989) A30

N.C. Gen. Stat. § 74E (1992) A35

STATE of North Carolina

v.

Alan Howard PENDLETON

No. 478A93.

Supreme Court of North Carolina.

Dec. 30, 1994.

Student at private, church-owned university was arrested by university police officer and convicted in the Harnett County District Court of driving while impaired. Student appealed. The Superior Court, Harnett County, W. Steven Allen, Sr., J., dismissed conviction on First Amendment grounds. State appealed. The Court of Appeals, Martin, J., 112 N.C.App. 171, 435 S.E.2d 100, reversed. Student appealed. The Supreme Court, Mitchell, J., held that delegation of police power to university violated establishment clause.

Reversed.

Whichard, J., dissented and filed opinion joined by Meyer and Webb, JJ.

[Headnotes omitted]

Appeal of right pursuant to N.C.G.S. § 7A-30 of a decision of the Court of Appeals, 112 N.C.App. 171, 435 S.E.2d 100 (1993), reversing an order entered by Allen (W. Steven, Sr.), J., on 29 April 1992 in Superior Court, Harnett County. Heard in the Supreme Court on 13 September 1994.

Michael F. Easley, Atty. Gen., by Valerie B. Spalding, Asst. Atty. Gen., for the State.

Patterson, Harkavy and Lawrence by Martha A. Geer, Raleigh, Stewart and Hayes by Gerald W. Hayes, Jr., and Lytch, Tart and Fusco, P.A. by Phillip A. Fusco, Dunn, for defendant-appellant.

Robert A. Buzzard, Buies Creek, for Campbell University, amicus curiae.

Patterson, Harkavy and Lawrence by Burton Craige, Raleigh and Daniel H. Pollitt, Chapel Hill, for American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

MITCHELL, Justice.

On 12 April 1991, Officer Reed Jones of the campus police force of Campbell University observed the defendant, Alan Howard Pendleton, operating an automobile on a public highway near that university's campus in Buies Creek, North Carolina. Jones followed the defendant as the defendant

traveled toward the campus. The defendant crossed the center line of the roadway several times and weaved back and forth within his lane of travel. Jones stopped the defendant and arrested him for driving while impaired in violation of N.C.G.S. § 20-138.1. On 26 June 1991, the defendant was convicted in District Court, Harnett County, of driving while impaired. He appealed to the Superior Court for trial *de novo*.

On 3 September 1991, the defendant filed a motion in the Superior Court, Harnett County, seeking dismissal of the charge against him on the ground that Chapter 74A of the General Statutes of North Carolina violated the First Amendment to the Constitution of the United States, and Article I, Sections 13 and 19, of the Constitution of North Carolina. Specifically, the defendant alleged that Chapter 74A was unconstitutional because it permitted employees of a religious institution to be commissioned and function as police officers and thereby authorized a religious institution to exercise the police power of the State. The defendant further alleged that by permitting the State--through its Attorney General--to delegate its police powers to a private, church-owned religious institution, Chapter 74A violated the constitutional separation of church and state because such a delegation "enables state authority to intervene in the church agency."

A hearing was held on the defendant's motion, during which uncontroverted evidence was introduced tending to show, *inter alia*, that Campbell University is closely affiliated with the Baptist State Convention of North Carolina. Campbell University operates a police force consisting of a

captain and eight full-time officers. All of the officers of that police force were commissioned as police officers by the Attorney General of North Carolina acting under the provisions of Chapter 74A authorizing him to commission as policemen the employees of certain public and private institutions or companies. At the times relevant to this appeal, Ricky Symmonds was employed as a deputy sheriff by the Harnett County Sheriff's Department. While so employed, Symmonds also acted as the chief of Campbell University's campus police force. Officer Jones, the officer who arrested and charged the defendant Pendleton, was employed as a police officer by Campbell University. The defendant was an undergraduate student at Campbell University and resided in a campus dormitory.

On 29 April 1992, Judge Allen entered an order in the Superior Court, Harnett County, concluding that Chapter 74A was unconstitutional because it created an excessive entanglement of state and church, constituted an impermissible delegation of authority to a religious institution and was an establishment of religion. The order further concluded that the defendant's arrest and the evidence obtained as a result had been invalid, since they had resulted from an unconstitutional delegation and exercise of the State's police power. Based on these conclusions, the order of the Superior Court allowed the defendant's motion to dismiss. The State appealed to the Court of Appeals.

At all times pertinent to this appeal, former Chapter 74A provided[1], *inter alia*:

> Any educational institution . . . whether State or private, . . . may apply to the Attorney General to commission such persons as the institution . . . may designate to act as policemen for it. The Attorney General upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen.

N.C.G.S. § 74A-1 (1989) (repealed by Session Laws 1991 (Regular Session, 1992), ch. 1043, § 8 (effective 25 July 1992)). Further, as the Court of Appeals stated in its opinion in the present case, former Chapter 74A also provided

---

[1] After the order of the Superior Court but before this case reached the Court of Appeals, Chapter 74A was repealed in its entirety. N.C.Sess.Laws 1991 (Regular Session, 1992), ch. 1043 § 8 (effective 25 July 1992). Provisions pertaining to the subject matter formerly controlled by Chapter 74A are now found in Chapter 74E of the North Carolina General Statutes. At all times pertinent to this appeal, however, the authority of the university and the officer who arrested and charged the defendant rested upon former Chapter 74A, exclusively. Therefore, this opinion is directed solely to the constitutionality of those former statutory provisions as they apply to the facts of this particular case.

> that policemen commissioned under the Chapter shall possess all the powers of municipal and county police to make arrests for felonies and misdemeanors and to charge for infractions on property owned by or controlled by their employers. N.C. Gen. Stat. § 74A-2(b). The authority of policemen who are employed by any college or university extends to the public roads passing through or immediately adjoining the property of the employer. N.C. Gen. Stat. § 74A-2(e)(1). In addition, the authority of such college or university policemen may be extended by agreement between the employer institution's board of trustees and the governing board of the municipality or county in which the institution is located. N.C. Gen. Stat. § 74A-2(e)(2) and (3).

State v. Pendleton, 112 N.C.App. 171, 175, 435 S.E.2d 100, 103 (1993). Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Court of Appeals concluded:

> Chapter 74A has a secular legislative purpose, its primary effect is neither to advance nor inhibit religion, it does not foster an excessive entanglement with religion and it is not an unconstitutional delegation of the State's law enforcement authority.

Pendleton, 112 N.C.App. at 180, 435 S.E.2d at 106. The Court of Appeals held that Chapter 74A was constitutional, both on its face and as applied.

Based on the uncontroverted evidence comprising the record on appeal before us, we conclude that the Superior Court did not err in holding that former Chapter 74A was unconstitutional as applied in the present case. Accordingly, we reverse the decision of the Court of Appeals and reinstate the order of the Superior Court, Harnett County, allowing the defendant's motion to dismiss.

The defendant has conceded on appeal before this Court that former Chapter 74A was facially constitutional. The defendant has argued here that former Chapter 74A, which provided *inter alia* for the delegation of the State's police power to educational institutions, was unconstitutional as applied to Campbell University because it violated the First Amendment to the Constitution of the United States and Article I, Sections 13 and 19 of the Constitution of North Carolina.

Ordinarily, when a statute is challenged on constitutional grounds, the best course is to evaluate any challenge made under the state constitution before turning to a review of the statute under the Constitution of the United States. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-95, 102 S.Ct. 1070, 1077-78, 71 L.Ed.2d 152, 163 (1982). *See Reed v. Madison*, 213 N.C. 145, 147, 195 S.E. 620, 622 (1938). However, where a law has been applied in such a manner as to be a manifest violation of the federal constitution as interpreted by the Supreme Court of the

United States, state constitutional review may be unnecessary and dilatory. Based on the particular evidence presented in this case, we conclude that, as applied, former Chapter 74A violated the First and Fourteenth Amendments to the Constitution of the United States. We base our decision in this case solely on federal constitutional grounds. We neither consider nor decide any state constitutional issues.

In cases applying the Establishment Clause of the First Amendment, the Supreme Court of the United States has developed a three-pronged analytical scheme for determining the constitutionality of legislative enactments. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. Under this analytical scheme, known as the Lemon test, to survive constitutional review:

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13, 91 S.Ct. at 2111, 29 L.Ed.2d at 755 (citations omitted). If a statute, as applied, violates any one prong of the Lemon test, it is unconstitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510, 518-19 (1987).

We turn our analysis to the third prong of the Lemon test and consider whether, based on the evidence presented in this case, the delegation of the State's police power to

Campbell University creates or fosters an excessive government entanglement with religion. This entanglement prong of the Lemon test has been the subject of much debate. It has been criticized as being "blurred, indistinct, and variable" as well as "insolubly paradoxical." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 768-69, 96 S.Ct. 2337, 2355, 49 L.Ed.2d 179, 200 (1976) (White, J., concurring, joined by Rehnquist, J., (now C.J.)). It has been said, for example, that the entanglement prong is paradoxical because it requires that aid to parochial schools be closely watched, yet such close supervision itself creates excessive entanglement. *Wallace v. Jaffree*, 472 U.S. 38, 109, 105 S.Ct. 2479, 2517, 86 L.Ed.2d 29, 77 (1985) (Rehnquist, J., dissenting). "The required inquiry into 'entanglement' has been modified and questioned," and the entire Lemon test has been said to have "proven problematic." *Wallace*, 472 U.S. at 68, 105 S.Ct. at 2496, 86 L.Ed.2d at 51 (O'Connor, J., concurring).

The Supreme Court's conspicuous nonreliance on *Lemon* in *Lee v. Weisman*, ___ U.S.___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), led some, including Mr. Justice Scalia, to believe that the test had been abandoned.[2] However, the Court resuscitated the oft-criticized Lemon test in *Lamb's Chapel v. Center Moriches*, ___ U.S. ___, 113 S.Ct.

---

[2] "The Court today demonstrates the irrelevance of Lemon by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Lee*, ___ U.S. at ___, 112 S.Ct. at 2685, 120 L.Ed.2d at 517 (Scalia, J., dissenting)(citation omitted).

2141, 124 L.Ed.2d 352 (1993). Employing the Lemon test, Justice White wrote for a clear majority of the Court in *Lamb's Chapel* that "there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled." *Lamb's Chapel*, ___ U.S. at ___, n. 7, 113 S.Ct. at 2148, n. 7, 124 L.Ed.2d at 363 n. 7. Consequently, the Lemon test remains the yardstick that this Court is required to use for measuring the constitutionality of statutes under the Establishment Clause.

In *Lemon*, the Supreme Court made it abundantly clear that the object of the Establishment Clause is to prevent the intrusion of either church or state into the domains of the other. *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112, 29 L.Ed.2d at 756. The Court stated there:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government.

Id. at 625, 91 S.Ct. at 2117, 29 L.Ed.2d at 763 (emphasis added). We must decide whether the Superior Court erred in concluding that there had been such an intrusion of a religious institution into government affairs, given the particular evidence forming the record in this case.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), the Supreme Court considered the excessive entanglement implication of a statute vesting important discretionary governmental powers in a

religious institution. Citing the third prong--the entanglement prong--of the Lemon test, the Supreme Court held in that case that the delegation of a State's alcohol licensing power to religious institutions was unconstitutional. In *Larkin*, a Massachusetts statute vested in governing bodies of churches and schools the power effectively to veto applications for liquor licenses for establishments within a 500-foot radius of such churches or schools. Holding the statute unconstitutional, the Supreme Court stated, "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Larkin*, 459 U.S. at 127, 103 S.Ct. at 512, 74 L.Ed.2d at 307.

In *Larkin*, the Supreme Court established a clear rule which this Court is required to follow in cases arising under the Establishment Clause: A state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution. All parties to this appeal concede that, pursuant to former Chapter 74A, the State of North Carolina delegated its police power to Campbell University. Therefore, this Court must resolve two questions. First, we must determine whether the police power is an important, discretionary governmental power within the Supreme Court's meaning in *Larkin*. Second, we must decide whether the particular uncontroverted evidence presented in this case supports the Superior Court's conclusion that Campbell University is a religious institution of a type contemplated by the Supreme Court in *Larkin*. If the answer to both these inquiries is yes, then we are required to hold that the statute, as applied on the

particular facts of this case, is unconstitutional on the ground that it violates the Establishment Clause.

The first question--whether the police power is an important discretionary governmental power--has already been answered clearly and expressly by the Supreme Court of the United States. In *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978), the Supreme Court held that "the exercise of police authority calls for a very high degree of judgment and discretion." *Id.* at 298, 98 S.Ct. at 1072, 55 L.Ed.2d at 294. The Supreme Court clearly and emphatically said that police "are clothed with authority to exercise an almost infinite variety of discretionary powers: and are vested with "plenary discretionary powers." *Id.* at 297-98, 98 S.Ct. at 1072, 55 L.Ed.2d at 293-94. Under this unmistakable mandate of the Supreme Court of the United States in *Foley*, we are required to conclude that the police power is an important discretionary governmental power.

Given that the police power is an important discretionary governmental power, we must next address the issue of whether, based on the particular uncontroverted evidence in the present case, the Superior Court erred in concluding that for purposes of analysis under the Establishment Clause, Campbell University is a "religious institution" within the meaning of that phrase as used by the Supreme Court in *Larkin*. The Superior Court's findings of fact are conclusive and binding on this Court if supported by substantial evidence. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). In the present case, the Superior Court, based upon

uncontroverted evidence including the "CAMPBELL UNIVERSITY BULLETIN 1990-92," made findings, as follows:

> Campbell University is a Baptist University located in Buies Creek, Harnett County, North Carolina. It was founded in [sic] January 5, 1887.
> In 1925, the school's property was deeded to the North Carolina Baptist Convention. Each student that attends Campbell University's undergraduate school is required to take Religion 101 and any additional religion course.
> Religion 101 is a basic Bible course with special emphasis on the birth and development of the Israelite nation, the life and time of Jesus and the emergence and expansion of the early church.
> All of the elective religious courses are centered around the Judeo-Christian religion. Campbell University's students are required to adhere to a Code of Ethics which arises out of the institution's statement of purpose [which states]:
>
> > *The basic principles which guide the development of Christian character and govern Christian behavior are to be found in the Scriptures. Moral law is the gift of God and is fully revealed in the teachings of Jesus Christ.*

The student, by virtue of his enrollment, agrees to abide by the rules and moral precepts which govern the University community.

Because of the University's commitment to the lordship of Christ over every area of life, wholehearted obedience to moral law as set forth in the Old and New Testaments and exemplified in the life of Christ applies to every member of the University community, regardless of position.

While the Bible does not provide a specific teaching regarding all social practices, its emphasis on general principles is unmistakable, particularly in circumstances where lack of self-restraint would be harmful or offensive to others. Out of these general principles come certain concrete expectations which should be viewed not negatively but as practical guidelines for conduct and for a productive way of life.

To uphold at all times and in all places, both on- and off-campus, the University's statement of purpose.

The Baptist State Convention of North Carolina recommends members of the Board of Trustees to the Baptist State Convention for election.

The legally designated authority of Campbell University rests in the Board of Trustees. Both in and out of the classroom Campbell University endeavors to present Christian principles to students and to foster their application to daily life.

Campbell University's mission [as expressly declared in the "CAMPBELL UNIVERSITY BULLETIN 1990-92"] is to:

> *Provide students with the option of a Christian world view.*
>
> *Bring the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility that will inspire a productive and faithful maturation as individual and as citizens;*
>
> *Transfer from one generation to the next the vast body of knowledge and values accumulated over the ages;*

Encourage creativity, imagination, and rigor in the use of intellectual skills;

Affirm the University's commitment to the belief that truth is never one-dimensional but in wholeness is revelatory, subjective, and transcendent as well as empirical, objective, and rational, and that all truth finds its unity in the mind of Christ;

Frame University teaching in the context of a liberal arts education seeking to free persons to live more abundantly and securely in an ever-changing social order;

Foster stewardship in nurturing the gifts of the mind and in developing aesthetic sensibilities;

Equip students with superior vocations skills, productive insights, and professional integrity;

Provide a community of learning that is committed to the pursuit, discovery, and dissemination of knowledge to serve the region as well as nation and international communities.

> By agreement between the University Board of Trustees and the governing board of the municipality [of Buies Creek], the University's police may exercise their police power throughout the municipality.
>
> By agreement between the University's Board of Trustees and the governing board of the county, the University's police power may extend county-wide.
>
> Campbell University police officers exercise their police power on campus and on the highway adjacent to property owned by Campbell University. There are two main highways that run through Campbell [University]--Highway 421 and [Highway 27].
>
> Captain Ricky Simmonds' immediate supervisor is the Dean of Student Life at Campbell University and the Dean has complete supervisory power over him. The Dean of Student Life is responsible for the administration of the University's disciplinary system, including its Code of Ethics.

The State did not object to the foregoing findings nor did it take exception to them on appeal to this Court. "Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). Therefore, this Court is bound by the above uncontested findings of the Superior Court. *Id.*; *accord State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986).

The Superior Court also found that "Campbell's religious purpose is inextricably intertwined with its secular activities and it unabashedly attempts to proselytize and indoctrinate its students." This is the only finding we quote that was excepted to by the State. From its findings--including the above uncontested findings and the single contested finding--the Superior Court concluded as a matter of law that for purposes of this case Campbell University is a "religious institution."

The Superior Court's conclusions of law are binding upon us if they are "required as a matter of law by the findings or correct as a matter of law in light of the findings." *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (citing *Mahaley*, 332 N.C. at 592-93, 423 S.E.2d at 64). In light of the findings of the Superior Court, which were not excepted to by the State and which, therefore, are binding upon this Court, we are compelled to conclude in this case that the Superior Court did not err when it concluded, for purposes of applying the Establishment Clause, that Campbell University is a "religious institution" within the meaning of the Supreme Court of the United States in its decision in *Larkin*.

Given the uncontroverted evidence, it is difficult to see how the Superior Court could have made any different findings or reached any different conclusions than it in fact reached. In its own university bulletin for 1990-92, Campbell University proclaimed with understandable religious enthusiasm that it "is a Baptist university" and that:

> The purpose of Campbell University arises out of three basic theological and Biblical presuppositions: learning is appointed and conserved by God as essential to the fulfillment of human destiny; in Christ, all things consist and find ultimate unity; and the Kingdom of God in this world is rooted and grounded in Christian community.

Therefore, Campbell University expressly defined its mission as including: "[providing] students with the option of a Christian world view; [bringing] the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility that will inspire a productive and faithful maturation as individuals and citizens . . . ." No one has disputed the fact that Campbell University also carries out laudable purposes relating to the secular education and training of its students. Nevertheless, where a trial court has found that an institution's secular purposes and religious mission are "inextricably intertwined"--as the Superior Court found from uncontroverted and substantial evidence in this case--we have no choice but to treat it as a religious institution for First Amendment purposes. *See Zobrest v. Catalina Foothills School District*, 509 U.S. ___, ___ and n. 1, 113 S.Ct. 2462, 2464 and n. 1, 125 L.Ed.2d 1, 7 and n. 1 (1993) (treating a school in which secular education and advancement of religious values or beliefs were inextricably intertwined as a religious institution); *Lemon*, 403 U.S. 602, 91 S.Ct. at 2107, 29 L.Ed.2d 745 (treating church-related schools that have the purpose of propagating and promoting

a particular religious faith as religious institutions). Consequently, the State's delegation of its police power to Campbell University under former Chapter 74A was--based upon the uncontested findings in this case--a delegation of an important discretionary power to a religious institution. As a result, we are required to hold that former Chapter 74A, as applied in this case, resulted in a violation of the Establishment Clause of the First Amendment as construed by the Supreme Court of the United States in *Larkin*. *Larkin*, 459 U.S. at 127, 103 S.Ct. at 512, 74 L.Ed.2d at 307.

We emphasize that our conclusion that the Superior Court did not err in holding that former Chapter 74A was unconstitutional as applied here to delegate police powers to Campbell University is based upon the unique facts as found by the Superior Court from the particular uncontroverted evidence presented, which findings of fact were not excepted to by the State in this case. We do not consider or decide the status of Campbell University for any other purpose or any other case. We merely hold that, based on the unique record before us, the order of the Superior Court holding the now repealed Chapter 74A to be unconstitutional as applied in this case was without error and must be reinstated. The decision of the Court of Appeals to the contrary must be reversed.

The decision we find ourselves bound to enter based upon binding decisions of the Supreme Court of the United States should not impede the proper enforcement of the criminal laws on the campus of Campbell University. There are methods other than those formerly set out in Chapter 74A

for providing for the safety and protection of college campuses--including those college campuses which are deemed by the Supreme Court of the United States, as a matter of constitutional law, to be religious institutions.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

WHICHARD, Justice, dissenting.

I agree with the Court of Appeals' conclusion that former Chapter 74A of the General Statutes did not violate the Establishment Clause of the First Amendment to the Constitution of the United States. I believe *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), upon which the majority relies to find Chapter 74A unconstitutional, is distinguishable and does not invalidate the statute.

The Massachusetts statute at issue in *Larkin* conferred upon the governing body of a church or school an absolute veto over applications for liquor licenses when the applicant sought to sell liquor within five hundred feet of the church or school. The United States Supreme Court determined that the statute substitutes the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the process

of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines. "*Larkin*, 459 U.S. at 127, 103 S.Ct. at 512, 74 L.Ed.2d at 307 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 623, 91 S.Ct. 2105, 2116, 29 L.Ed.2d 745, 762 (1971). It therefore created an excessive entanglement between church and state in violation of the First Amendment.

The majority opinion views *Larkin* as standing for the proposition that no important discretionary power may be delegated to a religious institution. I believe the holding is less expansive, namely, that a delegation of state power to a church violates the First Amendment when the church's exercise of that power fuses religious and governmental functions. Because the nature of both the institution involved and the power delegated in this case differ from those in *Larkin*, I do not believe the *Larkin* precedent requires that we hold Chapter 74A unconstitutional.

The entity that received and exercised state power in *Larkin* was a "formally constituted parish council," an "institution of religious government." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, ___ U.S. ___, ___, 114 S.Ct. 2481, 2488, 129 L.Ed.2d 546, 557 (1994). Campbell University is neither a church nor an "institution of religious government." It is an institution of higher education affiliated with the North Carolina Baptist Convention. The University's Board of Trustees, though comprised of members of Baptist churches from across the state, governs university affairs, not religious matters. Thus, the Board is not a religious governing body like a parish council.

The Supreme Court has long recognized that colleges and universities closely affiliated with, or even governed by, a religious denomination are not necessarily pervasively sectarian institutions as a result. *See, e.g., Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). In *Hunt* the Supreme Court concluded that the Baptist College at Charleston was not "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743, 93 S.Ct. at 2874, 37 L.Ed.2d at 931. The members of the Board of Trustees of the College were elected by the South Carolina Baptist Convention, which also had the sole power to amend the College's charter and whose approval was required for certain financial transactions. However, neither students nor faculty members had to meet religious qualifications for admission or appointment, and the College's operations were not "oriented significantly towards sectarian rather than secular education." *Id.* at 744, 93 S.Ct. at 2874, 37 L.Ed.2d at 931.

The Supreme Court reached a similar conclusion in *Tilton*. There the Court described the "general pattern" of education at religiously affiliated colleges and universities: "[B]y their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." *Tilton*, 403 U.S. at 686, 91 S.Ct. at 2099, 29 L.Ed.2d at 803. The Court proceeded to

note that the four universities receiving aid were "governed by Catholic religious organizations" and populated by predominantly Catholic faculties and student bodies. *Id.* However, all four schools admitted and employed non-Catholics, and none mandated student attendance at religious services. Theology courses, though required, were not limited to consideration of Roman Catholicism and were taught according to the professors' professional standards and "the academic requirements of the subject matter." *Id.* at 686-87, 91 S.Ct. at 2100, 29 L.Ed.2d at 803-04. Thus the Court concluded that all four universities were "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." *Id.* at 687, 91 S.Ct. at 2100, 29 L.Ed.2d at 804.

Campbell University fits the mold of the church-related universities involved in both *Hunt* and *McNair*. The institution's mission statement, quoted in the trial court's findings of fact and in the majority opinion here, contains both sectarian rhetoric and secular academic aims. Of the nine goals stated, five--a majority--are secular and reveal a commitment to academic rigor and intellectual development. The Supreme Court has declined to rely solely or significantly on an institution's religious rhetoric when determining whether it is pervasively sectarian. *See Hunt*, 413 U.S. at 743, 93 S.Ct. at 2874, 37 L.Ed.2d at 931. Similarly, such rhetoric does not render Campbell a religious institution as the term is used in *Larkin*. Though closely affiliated with a religious denomination, Campbell does not subordinate

secular education to religious doctrine; it functions neither as a church nor as a religious governing body.

Just as the nature of the institution involved here differs from that involved in *Larkin*, the nature and result of the power delegated also distinguish this case from that one. The statute challenged in *Larkin* conferred upon a church the power to veto applications for liquor licenses; the church thus effectively usurped the role of the state. Such abdication by the state created "'a fusion of governmental and religious functions,'" thus excessively entangling church and state. *Larkin*, 459 U.S. at 126-27, 103 S.Ct. at 512, 74 L.Ed.2d at 307 (quoting *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844, 858 (1963)).

The church-state relationship created by the state's delegation of its veto power to churches in *Larkin* "presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America." *Grumet*, ___ U.S. at ___, 114 S.Ct. at 2488, 129 L.Ed.2d at 557. Religious authority completely supplanted civic authority, allowing churches to use civic power for purely religious ends: "[The statute] substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The . . . statute thus enmesh[ed] churches in the processes of government . . . ." *Larkin*, 459 U.S. at 127, 103 S.Ct. at 512, 74 L.Ed.2d at 307.

By contrast, neither an abdication of state power to a church nor the resulting fusion of governmental and religious functions occurred here; thus, we are not forced to adopt the result the Supreme Court reached in *Larkin*. At issue here is the delegation of the state's police power. The Attorney General commissioned employees of Campbell University to act as police officers for the school under the authority of former Chapter 74A. Campbell paid the officers' salaries as required by section 74A-4 and remained civilly liable for the acts of the police in the exercise of their authority under the statute. N.C.G.S. § 74A-1 (1989). The officers had the same authority as municipal and county police "to make arrests for both felonies and misdemeanors and to charge for infractions." N.C.G.S. § 74A-2(b).

Additionally, the officers were required to take "the usual oath." N.C.G.S. § 74A-2(a). N.C.G.S. § 11-11 contains the oath for law enforcement officers.

> I, [name], do solemnly swear (or affirm) that I will be alert and vigilant to enforce the criminal laws of this State; that I will not be influenced in any matter on account of personal bias or prejudice; that I will faithfully and impartially execute the duties of my office as a law enforcement officer according to the best of my skill, abilities, and judgment; so help me, God.

N.C.G.S. § 11-11 (1990). The officers also had to take the oath found in Article VI, section 7 of the Constitution of North Carolina, *id.*, which states:

> I, [name], do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as [a law enforcement officer], so help me God.

Thus, members of Campbell's police force pledged to operate within the limits imposed on their law-enforcement power by the federal and state constitutions and laws, and to exercise their power in a neutral manner. The police power exercised by Campbell officers served not as a standardless vehicle for the advancement or protection of religious interests but as a neutral means of protecting the safety of all citizens and residents at and near the University. The existence of constitutional and statutory standards distinguishes this case from *Larkin*, where churches were not required to follow any standards or explain the exercise of their veto power. Further, the record here does not show that members of Campbell's police force proselytized students, visitors, or faculty or otherwise acted in a religious manner or for a religious purpose in their exercise of the powers delegated to them. The police power conferred was quintessentially secular, neutral and nonideological.

Finally, this delegation of power did not substitute the opinion of a religious body for that of the state and therefore did not fuse religious and governmental functions. "Where 'fusion' is an issue [as in *Larkin*], the difference lies in the distinction between a government's purposeful delegation on

the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Grumet*, ___ U.S. at ___, 114 S.Ct. at 2489, 129 L.Ed.2d at 558. Chapter 74A authorized the delegation of the police power to any company or educational institution on neutral bases, not on the basis of any belief or practice that was religious in nature. The First Amendment does not prohibit church-related institutions from receiving "public benefits that are neutrally available to all." *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 746, 96 S.Ct. 2337, 2344-45, 49 L.Ed.2d 179, 187 (1976). That Campbell is affiliated with the North Carolina Baptist Convention is wholly incidental to the state's commissioning of the University's police officers to enforce secular statutes of general applicability; in *Larkin*, by contrast, the churches received their civic authority because they were churches.

> In *Tilton* the Supreme Court warned that [t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Tilton, 403 U.S. at 678, 91 S.Ct. at 2095, 29 L.Ed.2d at 798-99. The objectives of the Establishment Clause of the

First Amendment were not impaired by the operation of former Chapter 74A because the statute did not create an excessive entanglement between church and state. The standard established by *Larkin* soundly prohibits states from allowing churches to exercise civic authority without appropriate standards and with the goal of protecting religious interests. The delegation here, however, was not to a church or a religious governing body, did not involve the exercise of civic power without standards, and did not have the purpose or effect of protecting or promoting religious interests. It thus did not run afoul of the Establishment Clause of the First Amendment.

I therefore respectfully dissent and vote to affirm the result reached by the Court of Appeals.

MEYER and WEBB, JJ., join in this dissenting opinion.

Chapter 74A.

Company Police.

[Subtitles omitted]

§ 74A-1. Attorney General may appoint and commission special police; civil liability of companies or corporations for which appointed.

Any educational institution or hospital, whether State or private, or any other State institution, public utility company, construction company, manufacturing company, auction company, incorporated security patrols or corporations engaged in providing security or protection services for persons or property, may apply to the Attorney General to commission such persons as the institution, corporation or company may designate to act as policemen for it. The Attorney General upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company or corporation from any civil liability for the acts of such policemen, in exercising or attempting to exercise the powers conferred by this Chapter.

§ 74A-2. Oath and powers of company police; exceptions as to railroad police and campus law enforcement.

(a) Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath.

(b) Such policemen, while in the performance of the duties of their employment, shall severally possess all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions:

(1) Upon property owned by or in the possession and control of their respective employers; or

(2) Upon property owned by or in the possession and control of any person or persons who shall have contracted with their employer or employers to provide security for protective services for such property; or

(3) Upon any other premises while in hot pursuit of any person for any offense committed upon property vested in subdivisions (1) and (2) above.

(c) Repealed by Session Laws 1981, c. 884, s. 4.

(d) The limitations on the power to make arrests contained in subdivisions (1), (2) [and] (3) of subsection (b) shall not be applicable to policemen appointed for any railroad company. Policemen appointed for railroad companies shall be required to post a bond in the sum of five hundred dollars ($500.00) in lieu of the bond required by subsection (c).

(e) Private Colleges and Universities. --

(1) In addition to the power to make arrests contained in subsection (b) of this section, such policemen who are employed by colleges and universities which are licensed, or exempted from licensure, by G.S. 116-15 shall have the same authority upon that portion of any public road or highway passing through or immediately adjoining the property described in subsection (b) of this section, wherever located.

(2) The board of trustees of any college or university which is licensed, or exempted from licensure, by G.S. 116-15 may enter into joint agreements with the governing board of any municipality to extend the law-enforcement authority of such policemen employed by the college or university into any or all of the municipality's jurisdiction and to determine the circumstances in which this extension of authority may be granted.

(3) The board of trustees of any college or university which is licensed, or exempted from licensure, by G.S. 116-15 may enter into joint agreements with the governing board of the county with the consent of the sheriff, to extend the law-enforcement authority of such policemen employed by the

college or university into any or all of the county's jurisdiction and to determine the circumstances in which this extension of authority may be granted.

§ 74A-3. Company police to wear badges.

Such policemen shall, when on duty, severally wear a shield with the words "Railway Police" or "Company Police" and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives.

§ 74A-4. Compensation of company police.

The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them.

§ 74A-5. Police powers cease on company's filing notice.

Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the office of the Attorney General and thereupon the power of such officer shall cease and determine.

§ 74A-6. Railway conductors and station agents declared special police.

All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of

the State of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall have such power only on their respective trains or their railroad right-of-way, and the agents at their respective stations; and such conductors and agents may cause any person so arrested by them to be detained and delivered to the proper authority for trial as soon as possible. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad company from any civil liability for the acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred.

Chapter 74E.

Company Police Act.

[Subtitles omitted]

§ 74E-1. Title.

This Chapter is the "Company Police Act" and may be cited by that name.

§ 74E-2. Policy and scope.

(a) The purpose of this Chapter is to ensure a minimum level of integrity, proficiency, and competence among company police agencies and company police officers. To achieve this purpose, the General Assembly finds that a Company Police Program needs to be established. As part of the Company Police Program, the Attorney General is given the authority to certify an agency as a company police agency and to commission an individual as a company police officer.

(b) A public or private educational institution or hospital, a State institution, or a corporation engaged in providing on-site police security personnel services for persons or property may apply to the Attorney General to be certified as a company police agency. A company police agency may apply to the Attorney General to commission an individual designated by the agency to act as a company police officer for the agency.

§ 74E-3. Liability insurance policy or certificate of self-insurance required; suspension of company police agency certification for failure to comply.

(a) An applicant for certification as a company police agency must file with the Attorney General either a copy of a liability insurance policy that meets the requirements of this section or a certificate of self-insurance designating assets sufficient to satisfy the coverage requirements of this section if the applicant is a non-public entity. The policy or certificate of self-insurance must provide not less than one million dollars ($1,000,000) of coverage per incident for personal injury or property damage resulting from a negligent act of the applicant or an agent or employee of the applicant operating in the course and scope of employment or under color of law. The form, execution, and terms of a liability insurance policy must meet the requirements of the Attorney General.

(b) An insurance carrier that issues a liability insurance policy required by this section may cancel the policy upon giving 30 days' written notice to both the company police agency and the Attorney General. The written notice must be given by certified mail, return receipt requested. Cancellation of a liability insurance policy does not affect any liability on the policy that accrued prior to the effective cancellation date.

(c) A company police agency that is a nonpublic entity must maintain the liability insurance policy or certificate of self-insurance required by this section in effect at all times. The Attorney General shall suspend the certification of a

company police agency that fails to maintain a liability insurance policy or certificate of self-insurance when required to do so by this section. A certification suspended for this reason may not be reinstated until the person whose certification was suspended files with the Attorney General an application for reinstatement and either the required liability insurance policy or certificate of self-insurance.

§ 74E-4. Powers of Attorney General.

The Attorney General has the following powers in addition to those conferred elsewhere in this Chapter:

(1) To establish minimum education, experience, and training standards and establish and require written or oral examinations for an applicant for certification as a company police agency, a certified company police agency, an applicant for commission as a company police officer, or a commissioned company police officer.

(2) To require a company police agency or a company police officer to submit reports or other information.

(3) To inspect records maintained by a company police agency.

(4) To conduct investigations regarding alleged violations of this Chapter or a rule adopted under this Chapter and to make evaluations as may be necessary to determine if a company police agency or a company police officer is complying with this Chapter or a rule adopted under this Chapter.

(5) To deny, suspend, or revoke a certification as a company police agency or a commission as a company police officer for failure to meet the requirements of or comply with this Chapter or a rule adopted under this Chapter, in accordance with Article 3 of Chapter 150B of the General Statutes.

(6) To appear in the name of the Company Police Program and apply to the courts having jurisdiction for injunctions to prevent a violation of this Chapter or a rule adopted under this Chapter.

(7) To delegate the authority to administer this Chapter.

(8) To require that the Criminal Justice Standards Division provide administrative support staff for the Company Police Program.

(9) To adopt rules needed to implement this Chapter, in accordance with Chapter 150B of the General Statutes.

§ 74E-5. Records.

(a) The Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Company Police Program.

(b) Any papers, documents, or other records that become the property of the Company Police Program and are placed in a company police officer's personnel file maintained by the Attorney General are subject to the same restrictions concerning disclosure as set forth in Chapters 126, 153A, and 160A of the General Statutes for other personnel records.

(c) Notwithstanding the provisions of subsection (b), the Attorney General may disclose the contents of any records maintained under the authority of this Chapter to the Criminal Justice Education and Training Standards Commission, or any other criminal justice agency for certification or employment purposes.

§ 74E-6. Oaths, powers, and authority of company police officers.

(a) Requirements. -- An individual who is commissioned as a company police officer must take the oath of office required of a law enforcement officer before the individual assumes the duties of a company police officer. The person in each company police agency who is responsible for the agency's company police officers must be commissioned as a company police officer.

(b) Categories. -- The following three distinct classifications of company police officers are established:

(1) Campus Police Officers -- Those company police officers who are employed by any college or university that is a constituent institution of The University of North Carolina or any private college or university that is licensed or exempted from licensure as prescribed by G.S. 116-15.

(2) Railroad Police Officers -- Those company police officers who are employed by a certified rail carrier and commissioned as company police officers under this Chapter.

(3) Special Police Officers -- All company police officers not designated as a campus police officer or railroad police officer.

(c) All Company Police. -- Company police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions on any of the following:

(1) Real property owned by or in the possession and control of their employer.

(2) Real property owned by or in the possession and control of a person who has contracted with the employer to provide on-site company police security personnel services for the property.

(3) Any other real property while in continuous and immediate pursuit of a person for an offense committed upon property described in subdivisions (1) or (2) of this subsection.

(d) Campus Police. -- Campus police officers have the powers contained in subsection (c) of this section and also have the powers in that subsection upon that portion of any public road or highway passing through or immediately adjoining the property described in that subsection, wherever located. The board of trustees of any college or university that qualifies as a campus police agency pursuant to this Chapter may enter into a mutual aid agreement with the governing board of a municipality or, with the consent of the county sheriff, a county to the same extent as a municipal police department pursuant to Chapter 160A.

(3) Railroad Police. -- Railroad police officers have the powers contained in subsection (c) and also have the powers

and authority granted by federal law or by a regulation promulgated by the United States Secretary of Transportation. Notwithstanding any of the provisions of this Chapter, the limitations on the power to make arrests contained in subsection (c) above, shall not be applicable to railroad police officers commissioned by the Attorney General pursuant to the authority of this Chapter.

(f) Campus Option. -- Notwithstanding any of the provisions of this Chapter, the Board of Trustees of any constituent institution of The University of North Carolina may elect to have its officers certified under Chapter 17C or Chapter 116 of the General Statutes rather than requesting certification as a company police agency and company police commission pursuant to the provisions of this Chapter.

(g) Exclusive Authority. -- Notwithstanding any other provision of law, the authority granted to company police officers shall be limited to the provisions of this Chapter.

§ 74A-7. Badges, uniforms, weapons, and vehicles.

Company police agencies shall be responsible for ensuring that all employees, whether or not commissioned, comply with the provisions of this Chapter and the rules adopted under this Chapter, including those provisions pertaining to the wearing of badges and uniforms, the carrying of weapons, and the operation of vehicles.

§ 74E-8. Minimum standards for company police officers.

Applicants for commission as a company police officer and a commissioned company police officer must

meet and maintain the same minimum preemployment and in-service standards as are required for State law enforcement officers by the North Carolina Criminal Justice Education and Training Standards Commission, and must meet and maintain any other preemployment and in-service requirements set by the Attorney General.

§ 74E-9. Compensation of company police officers.

The compensation of a company police officer shall be paid by the company police agency for which the officer is commissioned, as may be agreed between them.

§ 74E-10. Expiration, renewal, and termination of agency certification or officer commission.

(a) Agency. -- Unless sooner suspended or revoked by the Attorney General, a company police agency's certification expires on June 30 following the date it is issued. A company police agency may renew the certification upon payment of the appropriate fee and compliance with this Chapter and the rules adopted under this Chapter. An entity whose company police agency's certification was denied or revoked for a violation of this Chapter or a rule adopted under this Chapter is not eligible to apply again for that certification for three years.

(b) Officer. -- Unless sooner suspended or revoked by the Attorney General, a company police officer's commission expires on June 30 following the date it is issued. A company police officer may renew a commission upon payment of the appropriate fee and compliance with this Chapter and the rules adopted under this Chapter. The

Attorney General shall immediately revoke the commission of a company police officer when any of the following occurs:

(1) Termination of employment with the company police agency for which the officer is commissioned.

(2) Termination, suspension, or revocation of the certification of the company police agency for which the officer is commissioned.

(3) Failure to meet in-service training requirements, as required by this Chapter or the rules adopted under this Chapter.

(4) Violation of this Chapter or a rule adopted under this Chapter.

An individual whose company police officer's commission was denied or revoked for a violation of this Chapter or a rule adopted under this Chapter is not eligible to apply again for a commission for three years.

§ 74E-11. Immunity.

Neither the Attorney General nor any of the Attorney General's staff may be held criminally or civilly liable for any acts or omissions in carrying out the provisions of this Chapter or for the acts or omissions of agencies or officers certified or commissioned under this Chapter.

§ 74E-12. Fees.

[fee table omitted]

§ 74E-13. Penalties and enforcement.

(a) No private person, firm, association, or corporation, and no public institution, agency, or other entity shall engage in, perform any services as, or in any way hold itself out as a company police agency or engage in the recruitment or hiring of company police officers without having first complied with the provisions of this Chapter. Any person, firm, association, or corporation, or their agents and employees violating any of the provisions of this Chapter shall be guilty of a misdemeanor and punishable by a fine, imprisonment for a term not to exceed two years, or both, in the discretion of the court.

(b) The Company Police Program may apply in its own name to the superior court for an injunction to prevent any violation or threatened violation of this Chapter or a rule adopted under this Chapter, and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed because of the violation. The venue for an action brought under this subsection shall be in any county selected by the Attorney General.

(c) This section does not relieve a company police agency from any civil liability for the acts of its company police officers in exercising or attempting to exercise the powers conferred by this Chapter.